Supreme Court, U. S.
FILED
DEC 12 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. 74-6521

MONICA ALDINGER,
Petitioner,

—*v.*—

MERTON L. HOWARD, individually and in his capacity as Treasurer of Spokane County, and SPOKANE COUNTY, a public corporation,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 12, 1975
CERTIORARI GRANTED OCTOBER 6, 1975

IN THE

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

September 21, 1971 Plaintiff's complaint filed in U.S. district court for the eastern district of Washington.

October 6, 1971 Plaintiff's amended complaint filed.

February 22, 1973 Defendant's answer to amended complaint filed.

August 17, 1973 Defendant Spokane County's motion for judgment on the pleadings filed.

August 22, 1973 Plaintiff's second amended complaint filed.

September 25, 1973 Judgment of dismissal of claims against defendant Spokane County entered.

October 11, 1973 Plaintiff's notice of appeal to the court of appeals for the ninth circuit filed.

October 11, 1973 Agreed statement of case filed.

April 7, 1975 Opinion of the court of appeals for the ninth circuit entered.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

No. 3556

MONICA ALDINGER, a single woman, PLAINTIFF,

v.

MERTON L. HOWARD, ET AL., DEFENDANTS.

AMENDED COMPLAINT

I. NATURE OF CLAIM

1. This is an action for declaratory and injunctive relief and damages pursuant to 42 U.S.C. § 1983 to redress violations of rights secured to plaintiff by the First, Ninth and Fourteenth Amendments to the United States Constitution. Plaintiff seeks a declaratory judgment, pursuant to 28 U.S.C. §§ 2201 and 2202, that her dismissal from employment in the office of the County Treasurer of Spokane County, Washington, violated her constitutionally protected right to privacy and to freedom of expression and association, her right to equal protection of the laws, and her right to procedural and substantive due process. Inasmuch as plaintiff's dismissal was authorized by § 36.16.070 of the Revised Code of Washington, plaintiff seeks a declaratory judgment that this statute, on its face and as so applied, is similarly unconstitutional. Plaintiff further seeks a temporary restraining order and, upon hearing before a three-judge district court, pursuant to 28 U.S.C. § 2281 and § 2284, preliminary and permanent injunction restraining defendants from dismissing her from her employment, and restraining the operation of § 36.16.070 of the Revised Code of Washington inasmuch as it authorizes such dismissal.

II. JURISDICTION

2. Jurisdiction lies under 28 U.S.C. § 1331(a) and §§ 1343(3) and (4). The amount in controversy, exclusive of interests and costs, exceeds $10,000.

III. THREE-JUDGE DISTRICT COURT

3. The defendant County Treasurer's dismissal of plaintiff from h[illegible] employment was done under the asserted authority of § 36.16.070 of the Revised Code of Washington, which provided for dismissal of employment by a county officer "at [his] pleasure." Plaintiff seeks preliminary and permanent injunction restraining her dismissal, and restraining the operation of § 36.16.070 inasmuch as it authorizes such dismissal on the grounds that the dismissal and the statute, on its face and as so applied, violates plaintiff's constitutional rights. 28 U.S.C. § 2281 and § 2284 require that the action be heard and decided by a three-judge district court.

IV. PARTIES

4. Plaintiff MONICA ALDINGER is a citizen of the United States and a resident of the City of Spokane, Spokane County, Washington. Her address is West 212 Seventh Avenue, Apartment 4.

5. Defendant MERTON L. HOWARD is the County Treasurer of the Defendant Spokane County, Washington. Plaintiff is ignorant as to the true name of the named JANE DOE who, upon information and belief, is the wife of the defendant MERTON L. HOWARD. Because of lack of knowledge of the true name of the aforestated defendant JANE DOE, this defendant is sued herein under said name as a fictitious name and plaintiff prays that when the true name of this defendant is ascertained it may be inseted herein, and in all subsequent proceedings in said action, and that the said action may then proceed against her under her true name.

6. Defendant SPOKANE COUNTY is a public corporation and an action may be maintained against it authorized by RCW 4.08.120.

7. Defendants WILLIAM O. ALLEN, E. W. (BILL) PARSONS and RAY W. CHRISTENSEN are County Commissioners of the defendant SPOKANE COUNTY, Washington.

V. STATEMENT OF CLAIM

8. Plaintiff was employed in a filing and recording position in the Spokane County Treasurer's Office by defendant HOWARD on July 1, 1971. Plaintiff was employed at a salary of $98.00 per week.

9. On or about September 1, 1971, plaintiff was informed by defendant HOWARD that she would be dismissed as an employee of Spokane County, Washington.

10. In a letter (a copy of which is attached as Exhibit "A" dated August 30, 1971) defendant HOWARD informed plaintiff that, though her performance on the job had been "excellent," she was to be dismissed as an employee of Spokane County, Washington, because she was allegedly "living with [her] boy friend." On September 15, 1971, plaintiff was dismissed as an employee of Spokane County, Washington.

11. Plaintiff has performed her duties as a filer and recorder for Spokane County, Washington, diligently and her dismissal was based solely on the allegation that she was living with her boy friend.

12. No hearing on the issues raised by the dismissal of plaintiff was held prior to the dismissal, though plaintiff's attorney requested such a hearing.

13. No hearing on the issues raised by the dismissal of plaintiff has been held to date, though plaintiff's attorney has requested such a hearing.

14. The County Treasurer's dismissal of plaintiff was done under the asserted authority of § 36.16.070 of the Revised Code of Washington.

15. Plaintiff has no adequate remedy at law. The action of the defendants is causing, and will continue to cause, irreparable injury to plaintiff unless enjoined by this Court.

VI. FIRST CAUSE OF ACTION

16. Defendant's failure to notify plaintiff of the charges against her and to conduct a hearing prior to

plaintiff's dismissal and their continued failure to provide such notice or hearing violates plaintiff's rights under the due process clause of the Fourteenth Amendment to the United States Constitution. Inasmuch as plaintiff's dismissal in this matter was authorized by § 36.16.070 of the Revised Code of Washington, that statute, on its face and as so applied, has similarly violated plaintiff's rights under the due process clause of the Fourteenth Amendment to the United States Constitution.

VII. SECOND CAUSE OF ACTION

17. Defendants' dismissal of plaintiff from public employment violates plaintiff's rights under the due process clause of the Fourteenth Amendment to the United States Constitution in that the reason for the dismissal is arbitrary, vague and unreasonable. Inasmuch as plaintiff's dismissal was authorized by § 36.16.070 of the Revised Code of Washington, that statute, on its face and as so applied, is similarly violative of plaintiff's rights under the due process clause of the Fourteenth Amendment to the United States Constitution.

VIII. THIRD CAUSE OF ACTION

18. Defendants' dismissal of plaintiff from public employment violates her right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution. Inasmuch as plaintiff's dismissal was authorized by § 36.16.070 of the Revised Code of Washington, that statute, on its face and as so applied, is similarly violative of plaintiff's rights under the equal protection clause of the Fourteenth Amendment to the United States Constitution.

IX. FOURTH CAUSE OF ACTION

19. Defendants' dismissal of plaintiff from public employment violates plaintiff's right to privacy as protected by the First and Ninth Amendments and the due process clause of the Fourteenth Amendment to the United States

Constitution. Inasmuch as plaintiff's dismissal was authorized by § 36.16.070 of the Revised Code of Washington, that statute, on its face and as so applied, is similarly violative of plaintiff's constitutionally protected right to privacy.

X. FIFTH CAUSE OF ACTION

20. Defendant's dismissal of plaintiff from public employment violates plaintiff's rights to freedom of expression and association as protected by the First Amendment and the due process clause of the Fourteenth Amendment to the United States Constitution. Inasmuch as plaintiff's dismissal was authorized by § 36.16.070 of the Revised Code of Washington, that statute, on its face and as so applied, is similarly violative of plaintiff's rights under the First and Fourteenth Amendments to the United States Constitution.

XI. PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that:

A. A three-judge district court be convened to hear and decide this action, in accordance with 28 U.S.C. § 2281 and § 2284;

B. Pending the hearing and disposition of this action by a three-judge district court, a temporary restraining order be granted, pursuant to 28 U.S.C. § 2284(3), restraining defendants from dismissing plaintiff and permitting her to resume her employment;

C. Upon hearing before a three-judge district court:

[1] Preliminary and permanent injunctions be issued restraining defendants from violating plaintiff's constitutional rights by dismissing her from her employment, as alleged above, and restraining the operation of § 36.16.070 of the Revised Code of Washington inasmuch as it authorizes such dismissal;

[2] A declaratory judgment be entered declaring the County Treasurer's dismissal of plaintiff, and § 36.16.070 of the Revised Code of Washington, inasmuch as it authorizes such dismissal, on its face and as so applied, to be violative of plaintiff's rights under the United States Constitution, as alleged above;

[3] Plaintiff be awarded damages for her salary loss and other injuries suffered as a result of the unlawful acts alleged above;

[4] That plaintiff be awarded the costs and disbursements of this action;

[5] Plaintiff be granted such other and further relief as the Court feels just and proper.

DATED: October 6, 1971

SPOKANE, WASHINGTON

Respectfully submitted:

SPOKANE COUNTY
LEGAL SERVICES

/s/ Byron G. Powell
BYRON G. POWELL
Attorney for Plaintiff

Of Counsel:

DENNIS YEAGER, ROBERT ROBERTS
National Employment Law Project
401 West 117th Street
New York, New York

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

No. 3556

[Filed in the U.S. District Court, Eastern District of Washington, Feb. 22, 1973, J. R. Fallquist, Clerk, M. R., Deputy]

MONICA ALDINGER, PLAINTIFF

v.

MERTON L. HOWARD, ET AL., DEFENDANTS

DEFENDANTS ANSWER TO PLAINTIFF'S AMENDED COMPLAINT

COME NOW the defendants herein and in answer to the amended complaint of the plaintiff herein, admit, deny and allege as follows:

I — JURISDICTION

1. The defendants deny paragraph two of the amended complaint in its entirety as to any jurisdiction of this Court arising under either 28 USC Section 1331 (a) or 28 USC Section 1343 (3) and (4).

II — PARTIES

2. In answering the allegations of paragraph four of the amended complaint, the defendants are without information of the plaintiff's status as a citizen of the United States. Therefore as to this the defendants are unable to form a belief and therefore deny the same. Defendants admit that the plaintiff was a resident of Spokane at the time of her employment by defendant Howard.

3. In answering the allegations of paragraph five of the amended complaint, the defendants admit that Merton L. Howard is the County Treasurer of the defendant Spokane County, Washington. Defendants deny that any action may be brought in this Court against Mrs. Jane Doe Howard.

4. As to the allegations of paragraph six of the amended complaint, defendants admit that defendant Spokane County is a public corporation. Defendants deny, however, that RCW 4.08.120 is authority for this action in Federal Court against the County.

5. As to the allegations of paragraph seven of the amended complaint, the defendants admit the same.

III — STATEMENT OF CLAIM

6. In answering the allegations of paragraph eight and nine of the amended complaint, the defendants admit the same.

7. In answering the allegations of paragraph ten of the amended complaint, the defendants admit only that the letter referred to in the plaintiff's amended complaint was requested by and given to plaintiff after her employment had been terminated.

8. In answering the allegations of paragraphs eleven, twelve and thirteen of the amended complaint, the defendants deny each and every allegation contained herein.

9. In answering the allegations of paragraph fourteen of the amended complaint, the defendants admit the same.

10. In answering the allegations of paragraph fifteen of the amended complaint, the defendants deny the same.

IV — PLAINTIFF'S CAUSES OF ACTION

11. In answering the allegations of paragraphs sixteen, seventeen, eighteen, nineteen, and twenty of the plaintiff's amended complaint, the defendants deny each and every allegation contained therein.

V — DEFENSES

By way of further answer, and as matters of affirmative defense, defendants allege as follows:

12. Defendants allege as a defense lack of jurisdiction over the subject matter.

13. Defendants allege as a defense lack of judisdiction over the defendant County, the defendant County Commissioners, and the defendant Mrs. Jane Doe Howard.

14. Defendants allege as a defense the failure of plaintiff to state a claim upon which relief can be granted.

15. Defendants allege as a defense that defendant Howard was at all times acting pursuant to RCW 36-.16.070 which statute is presumed to be constitutional.

16. The defendants allege that plaintiff's conduct, attire, attitude, and performance were detrimental to the morale, efficiency, and harmony of the Treasurer's office.

17. The defendants further allege that the letter referred to in the amended complaint does not reflect nor was it ever intended to reflect the real reason for plaintiff's dismissal but merely was an attempt to recite the least objectionable grounds for plaintiff's dismissal.

18. Defendants further allege that plaintiff was given an adequate hearing by defendant Howard prior to her dismissal.

19. Defendants further allege that as a result of plaintiff's openly admitted violation of a Washington Criminal Statute RCW 9.79.120, defendant Howard, as a publicly elected official, was acting within his authority under RCW 36.16.070, and with a proper exercise of his discretion.

VI — PRAYER

WHEREFORE, defendants having fully answered the amended complaint of plaintiff on file herein, said defendants pray that:

A. The plaintiff's amended complaint be dismissed with prejudice;

B. Plaintiff's request for a temporary restraining order, and preliminary and permanent injunctions be denied;

C. That defendants be awarded their costs herein and that the Court grant such other relief as it deems proper.

DATED this 22nd day of February, 1973.

Respectfully submitted,

DONALD C. BROCKETT,
Prosecuting Atty.
Spokane, Washington

By /s/ Garald A. Gesinger
GARALD A. GESINGER,
Deputy Prosecuting
Attorney,
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

No. 3556

[Filed in the U.S. District Court, Eastern District of Washington, Aug. 22, 1973, J. R. Fallquist, Clerk, L. R., Deputy]

MONICA ALDINGER, a single woman, PLAINTIFF

vs.

MERTON L. HOWARD, ET AL., DEFENDANTS

SECOND AMENDED COMPLAINT

I. NATURE OF CLAIM

1. This is an action for declaratory and injunctive relief and damages pursuant to 42 U.S.C. § 1983 to redress violations of rights secured to plaintiff by the First, Ninth and Fourteenth Amendments to the United States Constitution. Plaintiff seeks a declaratory judgment, pursuant to 28 U.S.C. §§ 2201 and 2202, that her dismissal from employment in the office of the County Treasurer of Spokane County, Washington, violated her constitutionally protected right to privacy and to freedomdom of expression and association, her right to equal protection of the laws, and her right to procedural and substantive due process. Inasmuch as plaintiff's dismissal was authorized by § 36.16.070 of the Revised Code of Washington, plaintiff seeks a declaratory judgment that this statute, on its face and as so applied, is similarly unconstitutional. Plaintiff further seeks a temporary restraining order and, upon hearing before a three-judge district court, pursuant to 28 U.S.C. §§ 2281 and 2284, preliminary and permanent injunction restraining defendants from dismissing her from her employment, and restraining the operation of § 36.16.070 of the Re-

vised Code of Washington inasmuch as it authorizes such dismissal.

II. JURISDICTION

2. Jurisdiction lies under 28 U.S.C. § 1331(a) and §§ 1343(3) and (4). The amount in controversy, exclusive of interests and costs, exceeds $10,000. Further, the Federal District Court may exercise Pendant Jurisdiction over the state law claims against the parties as more fully set forth herein.

III. THREE-JUDGE DISTRICT COURT

3. The defendant County Treasurer's dismissal of plaintiff from her employment was done under the asserted authority of § 36.16.070 of the Revised Code of Washington, which provided for dismissal of employment by a county officer "at [his] pleasure." Plaintiff seeks preliminary and permanent injunction restraining her dismissal, and restraining the operation of § 36.16.070 inasmuch as it authorizes such dismissal on the grounds that the dismissal and the statute, on its face and as so applied, violates plaintiff's constitutional rights. 28 U.S.C. §§ 2281 and 2284 require that the action be heard and decided by a three-judge district court.

IV. PARTIES

4. Plaintiff is a citizen of the United States and resides in Spokane, Washington, at the time of her dismissal from employment with the County Treasurer.

5. Defendant Merton L. Howard is the County Treasurer of the defendant Spokane County, Washington, and at all times herein was acting both individually and in his official capacity as the treasurer and agent of defendant Spokane County. Plaintiff is ignorant as to the true name of the named Jane Doe, who, upon information and belief, is the wife of the defendant Merton L. Howard. Because of lack of knowledge of the true name of the aforementioned defendant Jane Doe, this defendant is sued herein under said name as a fictitious name

and plaintiff prays that when the true name of this defendant is ascertained it may be inserted herein, and in all subsequent proceedings in said action, and that the said action may then proceed against her under her true name.

6. Defendant Spokane County is a public corporation and an action may be maintained against it authorized by RCW 4.08.120.

7. Defendants William O. Allen, E. W. (Bill) Parsons and Ray W. Christensen are County Commissioners of the defendant Spokane County, Washington.

V. STATEMENT OF CLAIM

8. Plaintiff was employed in a filing and recording position in the Spokane County Treasurer's Office by defendant Merton L. Howard on July 1, 1971. Plaintiff was employed at a salary of $98.00 per week.

9. On or about September 1, 1971, plaintiff was informed by defendant Howard that she would be dismissed as an employee of Spokane County, Washington.

10. In a letter dated August 30, 1971, defendant Howard informed plaintiff that, though her performance on the job had been "excellent," she was to be dismissed as an employee of Spokane County because she was allegedly "living with [her] boy friend." On September 15, 1971, plaintiff was dismissed as an employee of Spokane County, Washington.

11. Plaintiff has performed her duties as a filer and recorder for Spokane County, Washington, diligently and her dismissal was based solely on the allegation that she was living with her boy friend.

12. No hearing on the issues raised by the dismissal of plaintiff was held prior to the dismissal, though plaintiff's attorney requested such a hearing.

13. No hearing on the issues raised by the dismissal of plaintiff has been held to date, though plaintiff's attorney has requested such a hearing.

14. The County Treasurer's dismissal of plaintiff was done under the asserted authority of § 36.16.070 of the Revised Code of Washington.

15. Plaintiff has no adequate remedy at law. The action of the defendants is causing, and will continue to cause, irreparable injury to plaintiff.

VI. FIRST CAUSE OF ACTION

16. Defendant's failure to notify plaintiff of the charges against her and to conduct a hearing prior to plaintiffs' dismissal and their continued failure to provide such notice or hearing violates plaintiff's rights under the due process clause of the Fourteenth Amendment to the United States Constitution. Inasmuch as plaintiff's dismissal in this matter was authorized by § 36.16.070 of the Revised Code of Washington, that statute, on its face and as so applied, has similarly violated plaintiff's rights under the due process clause of the Fourteenth Amendment to the United States Constitution.

VII. SECOND CAUSE OF ACTION

17. Defendants' dismissal of plaintiff from public employment violates plaintiff's rights under the due process clause of the Fourteenth Amendment to the United States Constitution in that the reason for the dismissal is arbitrary, vague and unreasonable. Inasmuch as plaintiff's dismissal was authorized by § 36.16.070 of the Revised Code of Washington, that statute, on its face and as so applied, is similarly violative of plaintiff's rights' under the due process clause of the Fourteenth Amendment to the United States Constitution.

VIII. THIRD CAUSE OF ACTION

18. Defendants' dismissal of plaintiff from public employment violates her right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution. Inasmuch as plaintiff's dismissal was authorized by § 36.16.070 of the Revised Code of Washington, that statute, on its face and as so applied, is similarly violative of plaintiff's rights under the due

process clause of the Fourteenth Amendment to the United States Constitution.

IX. FOURTH CAUSE OF ACTION

19. Defendants' dismissal of plaintiff from public employment violates plaintiff's right to privacy as protected by the First and Ninth Amendments and the due process clause of the Fourteenth Amendment to the United States Constitution. Inasmuch as plaintiff's dismissal was authorized by § 36.16.070 of the Revised Code of Washington, that statute, on its face and as so applied, is similarly violative of plaintiff's constitutionally protected right to privacy.

X. FIFTH CAUSE OF ACTION

20. Defendants' dismissal of plaintiff from public employment violates plaintiff's rights to freedom of expression and association as protected by the First Amendment and the due process clause of the Fourteenth Amendment to the United States Constitution. Inasmuch as plaintiff's dismissal was authorized by § 36.16.070 of the Revised Code of Washington, that statute, on its face and as so applied, is similarly violative of plaintiff's rights under the First and Fourteenth Amendments to the United States Constitution.

XI. PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that:

A. A three-judge district court be convened to hear and decide this action, in accordance with 28 U.S.C. §§ 2281 and 2284;

B. Pending the hearing and disposition of this action by a three-judge district court, a temporary restraining order be granted, pursuant to 28 U.S.C. § 2284(3), restraining defendants from dismissing plaintiff and permitting her to resume her employment;

C. Upon hearing before a three-judge district court:

(1) Preliminary and permanent injunctions be issued restraining defendants from violating plaintiff's constitutional rights by dismissing her from her employment, as alleged above, and restraining the operation of § 36.16.070 of the Revised Code of Washington inasmuch as it authorizes such dismissal;

(2) A declaratory judgment be entered declaring the County Treasurer's dismissal of plaintiff, and § 36.16.070 of the Revised Code of Washington, inasmuch as it authorizes such dismissal, on its face and as so applied, to be violative of plaintiff's rights under the United States Constitution, as alleged above;

(3) Plaintiff be awarded damages for her salary loss and other injuries suffered as a result of the unlawful acts alleged above;

(4) That plaintiff be awarded the costs and disbursements of this action;

(5) Plaintiff be granted such other and further relief as the Court feels just and proper.

DATED THIS 15th DAY OF AUGUST, 1973.

Respectfully submitted,

SPOKANE COUNTY LEGAL SERVICES

BY: /s/ Norman R. Rosenberg
NORMAN R. ROSENBERG,
Attorney for plaintiff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. 3556

[Filed in the U.S. District Court, Eastern District of Washington, Aug. 17, 1973; J. R. Fallquist, Clerk, L. R., Deputy]

MONICA ALDINGER, PLAINTIFF

v.

MERTON L. HOWARD, ET AL., DEFENDANTS

MOTION FOR JUDGMENT ON THE PLEADINGS

The defendants, SPOKANE COUNTY, WILLIAM O. ALLEN, E. W. (BILL) PARSONS, and RAY W. CHRISTENSEN, by their attorney, Garald A. Gesinger, Deputy Prosecuting Attorney for Spokane County, move the Court for Judgment of Dismissal as to these named defendants, based upon the pleadings heretofore filed in this matter, pursuant to Rule 12(c) of the Rules of Civil Procedure for the United States District Court.

Dated this 17th day of August, 1973.

/s/ Garald A. Gesinger
GARALD A. GESINGER
Deputy Prosecuting Attorney
Attorney for Defendants

Copy Received the 15th day of August, 1973.

/s/ Norman Rosenberg
Attorney for Plaintiff

/s/ R. Max Etter
Attorney for Plaintiff

MOTION FOR JUDGMENT
ON THE PLEADINGS

DONALD C. BROCKETT
Spokane County Prosecuting Attorney
County-City Public Safety Building
Spokane, Washington 99201

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. 3556

[Filed in the U.S. District Court, Eastern District of Washington, Sept. 25, 1973, J. R. Fallquist, Clerk, M. R., Deputy]

MONICA ALDINGER, PLAINTIFF

vs.

MERTON L. HOWARD, ET AL., DEFENDANTS

ORDER OF DISMISSAL

Defendant's motion for judgment on the pleadings having come on for hearing, the plaintiff represented by her attorneys, Spokane County Legal Services by Norman Rosenberg, and Max Etter, Jr., defendants represented by Garald Gesinger, Deputy Prosecuting Attorney for Spokane County, and the court having before it and considering the memoranda of the parties and having heard and considered argument, it is hereby ordered as follows:

The defendant's motion for judgment on the pleadings is hereby granted and this action is dismissed as to the defendant Spokane County in that 42 U.S.C. 1983, and 42 U.S.C. 1988, do not empower this court to exercise jurisdiction over this defendant, nor has this court the power to exercise pendent jurisdiction over the claims against Spokane County, inasmuch as this court now has no independent basis of jurisdiction over this defendant.

CERTIFICATE PURSUANT TO FRCP 54(b) AND 28 U.S.C. 1292(b)

It is determined by the court that there is no just reason for delay and hereby directs the entry of final judgment as to the defendant Spokane County.

Further, this court is of the opinion that the above order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of the litigation.

DONE IN OPEN COURT THIS 24th DAY OF SEPTEMBER, 1973.

/s/ Marshall A. Niell
MARSHALL A. NIELL
Judge

/s/ Garald Gesinger
GARALD GESINGER
Deputy Prosecuting Attorney

APPROVED BY:

/s/ Norman Rosenberg
NORMAN ROSENBERG
Attorney for plaintiffs

Entered in Civil Docket on 9/25/73—M. R.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. 3556

[Filed in the U.S. District Court, Eastern District of Washington, Oct. 11, 1973, J. R. Fallquist, Clerk, M. R., Deputy]

MONICA ALDINGER, PLAINTIFF

vs.

MERTON L. HOWARD, ET AL., DEFENDANTS

AGREED STATEMENT OF THE CASE

Pursuant to Rule 10(d), Federal Rules of Appellate Procedure the following agreed statement of the case along with the second amended complaint, the answer thereto, and the motion for and judgment of dismissal, shall constitute the record on appeal herein:

1. The action was filed on September 21, 1971.

2. All defendants filed and served their answers to the complaint. Discovery procedures commenced, and a pre trial conference and date and trial date were set.

3. Defendant Spokane County moved for judgment of dismissal as to them on August 17, 1973. A copy of the motion is attached hereto.

4. A judgment of dismissal as to defendant Spokane County was entered on September 25, 1973.

It is from the above judgment of dismissal attached hereto and incorporated herein that plaintiff appellant appeals.

/s/ Garald Gesinger
GARAND GESINGER, Deputy
Prosecuting Attorney for Defendant

/s/ Norman Rosenberg
NORMAN ROSENBERG
Attorney for Plaintiff

/s/ Max Etter, Jr.
MAX ETTER
Attorney for Plaintiff

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-3129

[Filed Apr. 7, 1975, U.S. Court of Appeals]

MONICA ALDINGER, a single woman,
PLAINTIFF-APPELLANT

v.

MERTON L. HOWARD, individually and in his capacity as Treasurer of Spokane County, and JANE DOE HOWARD, his wife, DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Eastern District of Washington

OPINION

Before: CARTER, WRIGHT and WALLACE, Circuit Judges.

WRIGHT, Circuit Judge:

This is an appeal from an order dismissing appellant's action against Spokane County, Washington. The order of dismissal was certified by the district court, pursuant to Fed. R. Civ. P. 54(b), as appropriate for immediate appellate review. We have jurisdiction under 28 U.S.C. § 1292(b).

Appellant Monica Aldinger sued Spokane County, its county commissioners, and its elected county treasurer, Howard, and his wife. She sought injunctive and declaratory relief and damages from what she claimed was her wrongful dismissal from employment in the county treasurer's office.

This dismissal, she asserted, was based solely on the allegation that she had been "living with [her] boy friend," and as such was subject to redress under the Civil Rights Act of 1871 [42 U.S.C. §§ 1983 and 1988]

as a violation, under color of state law, of her constitutional rights under the First, Fifth, Ninth, and Fourteenth Amendments. Appellant also asserted that these same facts gave rise to a cause of action against the county under *Wash. Rev. Code* § 4.08.120 (1973) (providing for vicarious liability of counties in certain situations), and asked the district court to exercise pendent jurisdiction over these state law claims.

In granting the county's motion that it be dismissed as a party, the district court ruled that neither 42 U.S.C. § 1983 nor § 1988 provides for a federal cause of action against a county under 28 U.S.C. § 1343, and that the pendent state law claim against the county must therefore also be dismissed "inasmuch as this court now has no independent basis of jurisdiction over this defendant." We affirm.

A. FEDERAL QUESTION JURISDICTION.

Appellant contends that her second amended complaint stated a cause of action under the Civil Rights Act of 1871 [42 U.S.C. §§ 1983 and 1988 (1970)] which fell within the district court's 28 U.S.C. § 1343 jurisdiction.[1] This argument is foreclosed by the Supreme Court's holding in *Moor* v. *County of Alameda*, 411 U.S. 695 (1973),

[1] Appellant's complaint also alleged that jurisdiction lay under 28 U.S.C. § 1331(a), and that the amount in controversy exceeded $10,000. A divided Second Circuit panel has recently found that such a jurisdictional allegation can sustain a direct action under the Fourteenth Amendment against a municipality not subject to the district court's § 1343 jurisdiction. *Brault* v. *Town of Milton*, —— F.2d —— (2d Cir., Feb. 24, 1975).

In *Brault*, however, the plaintiffs had relied on § 1331 as the sole asserted basis for federal question jurisdiction, and had consistently asserted a cause of action under the Fourteenth Amendment. Appellants in this action have consistently chosen to rely on their §§ 1983 and 1988 claims under § 1343, along with their pendent state claims, as the basis on which relief for Spokane County's alleged deprivations of their constitutional rights could be granted. Consequently, the district judge did not reach the question of whether the complaint would have been otherwise adequate to establish a § 1331 cause of action against a political subdivision of a state, nor need we reach that question here.

aff'g in part and rev'g in part Moor v. *Madigan*, 458 F.2d 1217 (9th Cir. 1972).

In *Moor*, the Supreme Court addressed the same question as that presented here: whether these Civil Rights Act provisions apply to political subdivisions of a state. Relying heavily on its earlier decision in *Monroe* v. *Pape*, 365 U.S. 167 (1961), the Court concluded that:

> ". . . § 1983 is unavailable to these petitioners insofar as they seek to sue the County. And § 1988, in light of the express limitation contained within it, cannot be used to accomplish what Congress clearly refused to do in enacting § 1983."

411 U.S. at 710.

Both *Moor* v. *County of Alameda* and *Monroe* v. *Pape* were civil rights actions wherein the relief sought was money damages. In the case before us, the appellant sought declaratory and injunctive relief as well as damages.

However, any possibility that a political subdivision might be a suable "person" under §§ 1983 and 1988 for purposes of declaratory and injunctive relief was eliminated by the Court's subsequent decision in *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973). In that case, the Court reviewed a three-judge court's determination that § 1983 provided for 28 U.S.C. § 1343 jurisdiction over an action by owners of a retail liquor establishment against the city of Kenosha, Wisconsin. Their action challenged that city's failure to conduct formal adversary hearings before refusing to renew plaintiffs' liquor license. Reversing, the Court stated:

> "We find nothing in the legislative history discussed in *Monroe*, or in the language actually used by Congress, to suggest that the generic word 'person' in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them. Since, as the Court held in *Monroe*, 'Congress did not undertake to bring municipal corporations within the ambit of' § 1983, *id.*, at 187, they are outside of its ambit for purposes of equitable relief as well as for damages. The District Court was therefore wrong in concluding that it had jurisdiction of appellees' complaints under § 1343."

Id. at 513.

Finally, we consider *City of Kenosha* v. *Bruno* controlling even though plaintiffs in that case sought to enjoin the actions of a city rather than a county. *Moor* v. *County of Alameda* clearly indicates that this difference is inconsequential as to § 1983 liability by using the terms "municipality" and "political subdivision" interchangeably. *See, e.g.*, 411 U.S. at 708. Consequently, the district court correctly determined that appellant failed to state a federal cause of action for either damages or for injunctive and declaratory relief.

B. JURISDICTION OVER THE PENDENT STATE LAW CLAIMS.

Appellant admits that, if the district court lacked jurisdiction over her federal causes of action against the county, it was required to dismiss her pendent state law claims against this defendant, together with the federal claims, by this court's decisions in *Hymer* v. *Chai*, 407 F.2d 136 (9th Cir. 1969) and *Moor* v. *Madigan*, *supra*. She suggests, however, that we should now abandon the *Hymer* rationale because: (1) the Supreme Court's opinion in *Moor* v. *County of Alameda* left the continued validity of *Hymer* in considerable doubt; and (2) the great majority of other courts which have considered this question have determined that pendent jurisdiction should be available to join parties as well as claims. We disagree.

In *Moor* v. *County of Alameda*, the Court was presented with the very question which is before us: Can a district court hear a party's state law claims against a named defendant over whom there is no independent federal basis for jurisdiction, where the nonfederal claims arise out of the same facts and circumstances as viable federal claims against other parties?

The *Moor* Court, however, purported to avoid reaching this question. Instead, it chose to affirm the alternative

holding of the lower courts that "as a purely discretionary matter the federal court was an inappropriate forum to hear these state claims," (458 F.2d at 1221), *even if* there was federal court power to adjudicate them. 411 U.S. at 715-17.

In the case before us, the district judge made no alternative ruling on the suitability of this case for the discretionary exercise of pendent jurisdiction. Rather, he based his dismissal of the state law claims against Spokane County exclusively on the ground that, under this court's decisions in *Hymer* v. *Chai* and *Moor* v. *Madigan*, he had no power to hear claims against "pendent parties."

Appellant contends that *Moor* v. *County of Alameda* contains language which compels a re-examination of this court's opinions in *Hymer* and *Moor*.

In *Hymer* v. *Chai*, we first considered whether the Supreme Court's expansion of the doctrine of pendent jurisdiction in *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966), allowed joinder of additional parties as well as joinder of state law claims arising out of "a common nucleus of operative fact" with viable federal claims. We said that "[j]oinder of claims, not joinder of parties, is the object of the doctrine," 407 F.2d at 137, and held such an expansion unwarranted.

In *Moor* v. *Madigan*, we said:

> "We are thus confronted with a question on which there is an apparent conflict, but on which this court has previously taken a stand in *Hymer*. Having found ample support for the position taken by this court in *Hymer* and having been shown no compelling reason to reverse that stand, we conclude that the court below properly relied on *Hymer* in refusing to exercise jurisdiction over the pendent state claims."

458 F.2d at 1221 (footnote omitted).

In *Moor* v. *County of Alameda*, the Supreme Court noted that "*Hymer* stands virtually alone against [the] post-*Gibbs* trend in the courts of appeals" to permit district courts to hear pendent claims involving additional parties, where the entire action arises out of a single constitutional "case" as defined in *Gibbs*. 411 U.S. at

713-14. The *Moor* Court went on to note the substantial analogies between the joinder of parties under pendent jurisdiction and under expanded concepts of ancillary jurisdiction reflected in Fed. R. Civ. P. 13(a), 13(h), and 14(a).

However, the Supreme Court's opinion also recognized that there are strong arguments in favor of restricting at least certain types of state law actions to available state forums rather than hearing them in federal courts. The Court concluded that the question of federal judicial power to hear such state law claims against "pendent parties" is "a subtle and complex question with far-reaching implications," presenting difficult issues not appropriate for resolution in the case there before it. 411 U.S. at 715.

It seems clear to us that we are not bound by any of the above-noted dicta in *Moor* v. *County of Alameda* to reconsider our decisions in *Hymer* v. *Chai* and *Moor* v. *Madigan*. We are therefore free to dispose of this issue on the basis of our previous stand in *Hymer* just as this court disposed of the similar challenge to the *Hymer* rationale in *Moor* v. *Madigan*. *See* 458 F.2d at 1221.

Appellants have also asked that this case be considered *en banc*, in the event that we should affirm the determination of the district court. We are not unaware of the widespread rejection of *Hymer* by other courts. In fact, support for this court's position seems to have eroded since our holding in *Moor* v. *Madigan*.[2] However, we are of the opinion that any reconsideration of *Hymer* should occur in the context of a case which affords a more invit-

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[2] *Patrum* v. *City of Greensburg*, 419 F.2d 1300 (6th Cir. 1969), was the only post-*Gibbs* appellate case from another circuit to which we were able to point in *Moor* v. *Madigan*, 458 F.2d at 1221, as supportive of *Hymer*. On reflection, however, this case cannot be said to stand for the proposition that, in all situations, the district court is without discretion to join pendent parties. The Sixth Circuit's rejection of the *Hymer* rationale is in any event made clear by that court's subsequent decision in *F. C. Stiles Contracting Co.* v. *Home Insurance Co.*, 431 F.2d 917, 919-20 (6th Cir. 1970), *cited in Moor* v. *County of Alameda*, 411 U.S. at 713 n.29.

ing opportunity for abandonment or modification of that opinion than does the one before us.

Judge Peckham's thoughtful analysis in *Rundle* v. *Madigan*, 331 F. Supp. 492 (N.D. Cal. 1971), demonstrates several reasons why a case like *Moor* or this one presents the weakest rationale for the expansion of *Gibbs* to cover pendent parties. *See id.* at 494-95. In the first place, appellant here seeks to press her state claims against a party defendant who would not otherwise be in federal court. This situation presents a greater risk of serious inconvenience to the defendant than does allowing an additional plaintiff to pursue his state claims in federal court against a defendant already subject to that court's jurisdiction as to other claims arising out of the same facts.

Secondly, diversity cases have generally presented more attractive opportunities for the exercise of pendent jurisdiction over additional parties asserting state law claims than have analogous cases arising in the context of federal actions based on federal question jurisdiction. In part, this is due to the fact that since all the claims arising in the diversity context are based on state law, they are for that reason more easily tried together than cases where the two sets of claims are based on substantially different theories of law. Also, as Judge Peckham noted, in the diversity cases where joinder of "pendent parties" has been permitted, the courts have often been confronted with claims by members of a single family arising out of a single accident. "The litigation of these intimately related claims in a single forum makes good practical sense." 331 F. Supp. at 495.

We are also of the view that lower federal courts should be cautious in expanding *Gibbs* to the type of situation involved in this case. Pendent jurisdiction remains a judicially-created basis for federal court jurisdiction, albeit an eminently reasonable one in many cases. Since Congress specifically declined to render political subdivisions subject to suit under the Civil Rights Act of 1871, it is at least arguable that this legislation and Congress' failure to repeal it reflect a congressional disinclination to see local governmental units subjected to

actions in federal courts arising out of alleged deprivations of the civil rights of their own citizens.[3]

Finally, pendent state law claims arising in the context of federal civil rights actions will almost inevitably involve the same sort of difficult and unsettled questions of state law, and result in the same concomitant potential for jury confusion, which the district court found likely in *Rundle* v. *Madigan*, *supra*.[4] This prospect, we think, would usually prompt the district judge to refuse to exercise jurisdiction over the pendent claims against a city or county, even though he had the discretionary power to accept it.[5] Hence, to say that there was power to adjudi-

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[3] *Cf. Brault* v. *Town of Milton*, —— F.2d —— (2d Cir., Feb. 24, 1975), slip op. at 1876 (Timbers, J., dissenting.

Of course, a county is still subject to a federal court action based on state law claims brought against it by a citizen of another state meeting the jurisdictional amount requirement. *See Moor* v. *County of Alameda*, 411 U.S. at 717-22.

[4] In *Rundle* v. *Madigan*, the district court found that adjudicating the state law claims would require it "to resolve difficult questions of [state] law upon which state court decisions are not legion." 331 F. Supp. at 495 n.5. The court also took particular note of the complex nature of the defenses and justifications Alameda County might be able to raise. *Id.*

In the case before us, the district court did not consider whether similar defenses would have been available to the county in an action under Wash. Rev. Code § 4.08.020. However, appellee has suggested several difficult issues relating to its susceptibiilty to vicarious liability under that section in cases of this sort. It would thus appear that the potential for jury confusion would also have been substantial in this case. The jury would have had to keep in mind the distinct state law standards applicable to each class of defendants, as well as the relevant criteria for assessing the possible § 1983 liability of the non-county defendants.

[5] Courts which have had occasion to make such discretionary rulings on the appropriateness of joining pendent municipal or county defendants in federal civil rights actions against local officials have regularly opted to dismiss the pendent claims. *See, e.g., Patrum* v. *City of Greensburg*, 419 F.2d 1300, 1302 (6th Cir. 1969); *cf. Moor* v. *County of Alameda*, 411 U.S. at 715-17; *Moor* v. *Madigan*, 458 F.2d at 1221. Even if we were to accept appellant's suggestion and remand this case, there is no reason to expect that the district judge would not act similarly and exercise his discretion against hearing the pendent claims against Spokane County.

cate the state law claims would, in most cases such as this one, involve giving with one hand what will be taken away by the other.

The judgment of the district court is affirmed, and the district court is directed to proceed with appellant's actions against the remaining defendants.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-3129
DC #3556

[Filed in the U.S. District Court, Eastern District of Washington, June 13, 1975, J. R. Fullquist, Clerk, ——, Deputy]

MONICA ALDINGER, a single woman,
PLAINTIFF-APPELLANT

v.

MERTON L. HOWARD, individually and in his capacity as Treasurer of Spokane County, and JANE DOE HOWARD, his wife, DEFENDANTS-APPELLEES

APPEAL from the United States District Court for the Eastern District of Washington (Spokane)

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

Clerk directed to enter this 12th day of June, 1975.

/s/ Marshall A. Niell
United States District Judge

Filed and entered April 7, 1975

A TRUE COPY
ATTEST Jun. 10, 1975

EMIL E. MELFI, JR.
Clerk

by /s/ [Illegible]
Deputy

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-6521

MONICA ALDINGER, PETITIONER

v.

MERTON L. HOWARD, ETC., ET AL.

On petition for writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 6, 1975

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